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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, IDAHO STATE BOARD
OF LAND COMMISSIONERS and IDAHO
DEPARTMENT OF LANDS,

Plaintiffs/Respondents,

vs.

PHILIP HUDSON,

Defendant/Appellant.

Supreme Court Docket No. 44418

Bonner County No. CV-2015-1075

APPELLANT'S BRIEF

**Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for Bonner County**

The Honorable Barbara Buchanan, District Judge

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I. STATEMENT OF THE CASE.

A. Nature of the Case.

Appellant Philip Hudson owns littoral property on Priest Lake. The boundary between Hudson's property and the adjacent submerged lands of the State is determined by the location of the Ordinary High Water Mark (OHWM) of Priest Lake at Statehood. In order to protect his property from erosive action, Hudson placed fill on his property, by hand, over a period of several years. That fill extends approximately nineteen (19) feet waterward of the elevation of the OHWM as urged by the State. Hudson accomplished this work without a permit and under the belief that he was working on his own property.

IDL brought an enforcement action against Hudson under the Lake Protection Act (LPA). IDL claimed that Hudson had placed fill waterward of the OHWM without a permit. IDL took the position, by sworn submissions, that the OHWM of Priest Lake was located at elevation 2437.64 feet and that Priest Lake did not have an Artificial High Water Mark (AHWM). Hudson claimed that there were material issues of fact as to the location of the OHWM of Priest Lake. Hudson claimed that the OHWM of Priest Lake was at least two vertical feet lower than the level urged by the State. If Hudson is correct, then Hudson's unpermitted encroachment lies upland of the State-owned bed, is part and parcel of Hudson's property, and is not otherwise subject to the provisions of the LPA.

IDL moved for partial summary judgment, seeking a declaration that Hudson had violated provisions of the LPA and for entry of injunctive relief ordering the removal of the fill. The District

Court entered partial summary judgment in favor of IDL (certified as final pursuant to IRCP 54(b)), including corresponding injunctive relief. The District Court concluded that IDL had jurisdiction up to elevation 2437.64 feet (which would include the land lying under the Hudson encroachments) based upon the concept of an AHW. Hudson argues that the District Court's decision on partial summary judgment was in error as the State has affirmatively represented, under oath, that there is no AHW on Priest Lake and that the sole issue for determination is whether or not the OHWM of Priest Lake is 2437.64 feet or lower. Hudson suggests that material issues of fact as to the location of the OHWM of Priest Lake precluded entry of summary judgment and that the District Court's decision should be reversed.

B. Course of Proceedings.

On July 13, 2015, the State of Idaho, the Idaho State Board of Land Commissioners, and the Idaho Department of Lands (collectively referred to herein as "IDL"), brought suit against Philip Hudson (hereafter "Hudson"). R., pp. 7-14. IDL's complaint was filed under the provisions of the Idaho Lake Protection Act, I.C. §58-1301, et seq. (hereafter "the LPA") and I.C. §58-312. IDL alleged that Hudson, an owner of littoral property on Priest Lake, had placed an unpermitted and unauthorized encroachment (fill comprised of concrete, rocks, and dirt) below the ordinary high water mark ("OHWM") of Priest Lake. Id.

IDL's complaint asserted two claims. First, IDL claimed that Hudson had violated the LPA by placing fill waterward of the OHWM of Priest Lake, and that a mandatory injunction should enter

ordering Hudson to remove such fill as may be located below the OHWM. Id. at pp. 5-7. Second, IDL asserted a trespass claim under I.C. §58-312, and requested similar injunctive relief ordering Hudson to remove any fill located waterward of Priest Lake's OHWM. Id. at pp. 6-8. Hudson answered IDL's complaint, and asserted a counterclaim. Id. at pp. 15-24. Hudson alleged that the fill in issue was located upland of the OHWM of Priest Lake. Id. at pp. 21-22 (¶7). Hudson asserted two counterclaims. First, Hudson asserted a counterclaim for declaratory relief adjudging and decreeing that the encroachments on the Hudson parcel are located upland of the OHWM of Priest Lake as it existed on July 3, 1890. Id. at p. 22 (¶10). Second, Hudson asserted a claim for quiet title to the property upon which the fill was located (alleged to be upland of the OHWM of Priest Lake). Id. at pp. 22-23.

IDL thereafter moved for partial summary judgment on its first claim for relief under the LPA. Id. at pp. 68-70. In support of its motion, IDL affirmatively alleged that the OHWM of Priest Lake at statehood was 2437.64 feet MSL. Id.¹ In support of its motion, IDL affirmatively "denie[d] that there is an artificial high water mark of Priest Lake...." Id. at p. 70. IDL argued that the Hudson encroachment was located waterward of elevation 2437.64, that said elevation represented the OHWM of Priest Lake, and that an injunction should enter ordering Hudson to remove the fill. Id. at pp. 68-70.

¹ All elevations used herein are consistent with those used in proceedings before the District Court. Those elevations are consistent with the method and manner by which IDL administers the LPA at Priest Lake and are based upon datum of 1929 (supplementary adjustment in 1947). R., p. 84.

IDL supported its Motion for Partial Summary Judgment with the affidavits of Mick Schanilec and Matthew Anders. Shanilec is Area Manager for the Priest Lake Supervisory Area IDL. Id. at p. 84. Schanilec testified by affidavit, under oath, that “the State considers the natural or ordinary high water mark” of Priest Lake to be 2437.64. Id. at p. 84. Anders is a hydrologist employed with the Idaho Department of Water Resources (“IDWR”). Id. at p. 110. Anders did not offer an opinion as to the elevation of the OHWM of Priest Lake at statehood.

Hudson’s materials in opposition to IDL’s Motion for Partial Summary Judgment included declarations of Hudson, Ernest M. Warner, PLS, and Drew C. Dittman, P.E. Hudson averred, inter alia, as follows:

I did not seek a permit for the work [which I] accomplished by hand ..., as I believed, and continue to believe, that I was working on my own property, and placing no encroachments in or on the water or the property of the State of Idaho.

Id. at p. 168.

Warner, a licensed surveyor with 43 years of experience who previously offered expert testimony in Erickson v. State, 132 Idaho 208, 970 P.2d 1 (1998) and In Re: Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006), offered several opinions. In particular, Warner opined:

- (1) That the OHWM of Priest Lake, at Statehood, was at least two vertical feet lower than 2437.64, and perhaps as much as 2.3 vertical feet lower.
- (2) That most, if not all, of the Hudson fill was located upland of the OHWM as located pursuant to his opinion (2 to 2.3 vertical feet lower than 2437.64 feet).
- (3) That the Hudson property would extend 19 feet waterward of elevation

2437.64 feet if Warner's opinion as to the true location of the OHWM (at least 2435.64 feet) was correct.

Id. at p. 202.

In his declaration, Dittman averred that he physically measured the Hudson fill and that it extended 19 feet seaward of elevation 2437.64. Id. at p. 217. In other words, if the OHWM was located two vertical feet lower than 2437.64, consistent with Warner's opinion, then Hudson's encroachments would be located upland of the OHWM.

On June 15, 2016, IDL, by way of reply, submitted the Second Affidavit of Mick Schanilec. Id. at p. 231. The second Schanilec affidavit was submitted five (5) days prior to the June 22, 2016 hearing which IDL had noticed on its Motion for Partial Summary Judgment. Id. Obviously, the second Schanilec affidavit was not filed in compliance with the timelines set forth in IRCP 56. Further, the second Schanilec affidavit was not accompanied by a motion to alter the timelines under IRCP 56(e).

On June 17, 2016, Hudson moved to strike the second Schanilec affidavit. Id. at pp. 251-252. The Motion to Strike was accompanied by a Motion to Shorten Time. Id. at pp. 267-69. Following the June 22, 2016 hearing on IDL's Motion for Partial Summary Judgment, the Court issued its "Memorandum Decision and Order," granting IDL's motion. Id. at pp. 307-14. The District Court held that "because [Idaho Code §58-1302] makes clear that the State of Idaho has the power to regulate and control encroachments on land lying between the OHWM and the AHW [Artificial High Water Mark]," that IDL was entitled to the requested relief. Id. at p. 312. Hudson claims that

the District Court's order, and the judgment that followed it, are in error based upon the disputed facts presented on summary judgment. IDL specifically denied, as a matter of fact, that there was an AHW on Priest Lake.

On July 15, 2016, the Court entered a "Mandatory and Permanent Injunction," ordering that Hudson remove all unauthorized fill "below the high water mark of Priest Lake, regardless of whether the high water mark is natural or artificial...." *Id.* at p. 316. The parties subsequently stipulated to entry of a judgment certified as final in accordance with IRCP 54(b). *Id.* at pp. 318-20. On July 28, 2016, the District Court entered its "Amended Partial Judgment," certified as final pursuant to IRCP 54(b), which was consistent with the terms of the Court's "Mandatory and Permanent Injunction" of July 15, 2016. *Id.* at pp. 328-30. On August 12, 2016, Hudson timely appealed from the District Court's Amended Partial Judgment, Memorandum Decision and Order, and Permanent Injunction.

C. Statement of Facts.

The State of Idaho owns in trust for the public title to the beds of navigable waters below the Ordinary High Water Mark (OHWM) as it existed at the time Idaho was admitted into the Union (July 3, 1890). *See, e.g., Erickson v. State*, 132 Idaho 208, 970 P.2d 1 (1998). The OHWM is "the line which the water impresse[d] on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes," as of July 3, 1890. *Erickson v. State*, 132 Idaho at 210-11 (citing *Heckman Ranches, Inc. v. State*, 99 Idaho 793, 796, 589 P.2d 540

(1979) and I.C. §58-104(9)).

A dam was constructed by the State of Idaho, at the outlet of Priest Lake, in approximately 1950. R., p. 112. The dam was first used for water storage purposes on August 9, 1950. Id. Since 1951, the approximate date when the dam became operational, the level of Priest Lake has been stabilized from the months of July through September at elevation 2437.64 feet. R., p. 198.

In proceedings before the District Court, IDL affirmatively represented that “it denies that there is an artificial high water mark of Priest Lake....” R., p. 70. Mick Schanilec, Area Manager for the Priest Lake Supervisory Area for IDL, offered sworn testimony that “the State considers the natural ordinary high water mark of Priest Lake to be 2437.64 feet.” R., p. 84.

The Hudson fill extends approximately 19 feet waterward of elevation 2437.64. R., p. 217. If the OHWM of Priest Lake, at Statehood, was approximately two vertical feet lower than 2437.64 feet (the OHWM level urged by IDL), then most, if not all, of the Hudson fill would be located upland of said OHWM. R., p. 202.

Hudson offered evidence on summary judgment, including the expert opinion of Ernest Warner, suggesting that the location of the OHWM of Priest Lake at statehood was at least two vertical feet lower than the elevation urged by IDL (2437.64 feet). This evidence included expert hydrograph interpretation and historic survey information.²

² A “hydrograph” is a tool used by hydrologists to study the characteristics of a waterway and includes elevation readings measured over a given period of time and plotted in graphic format. R., p. 112.

Hydrograph evidence of Priest Lake levels predating 1950 show that the lake elevation annually fell to 2435.64 feet by approximately August 1 of each year (or two (2) vertical feet lower than the OHWM as urged by IDL). R., pp. 198 and 205. Prior to 1950, the level of Priest Lake fell to approximately 2435.1 feet by September 1 (or 2.54 feet lower than the OHWM urged by IDL). Id.

The location of a given OHWM, at Statehood, is a question of fact. The OHWM can be determined, in part, based upon the utilization of a vegetation test.³ It is self-evident that vegetation grows in North Idaho during the month of August. It can reasonably be inferred from the evidence that prior to 1950, the elevation of Priest Lake was at least two (2) vertical feet lower than the level urged by IDL. Further, since the adjacent upland soil was free of the presence of water above elevation 2435.64 feet during the month of August, it is more probable than not that under a vegetation-based test, the location of the OHWM of Priest Lake at Statehood was at least two (2) vertical feet lower than the level urged by IDL.

Other independent evidence, offered on summary judgment by Hudson, included the location of the original GLO meanderline adjacent to the Hudson property.

“Meanderlines” established by government survey are survey lines drawn along the banks of navigable streams for the purposes of defining the sinuosities of the banks of the stream, and as the means of ascertaining the price to be paid by the

³ A given OHWM is determined in part by “the line which the water impresse[d] on the soil by covering for sufficient periods of time to deprive the soil of its vegetation and destroy its value for agricultural purposes.” See In Re: Sanders Beach, 143 Idaho at 446 (citing I.C. §58-104(9)).

purchaser to the government for meandered fractional lots.

Heckman Ranches, Inc. v. State, 99 Idaho 793, 796 (citation omitted), 589 P.2d 540 (1979).

Ordinarily, meanderlines established by surveys of public lands bordering on navigable lakes are not boundary lines. Id. Rather, the boundary line is the OHWM, regardless of the location of the meanderline. Id. In general, meanderlines are established by a Government Land Office (GLO) survey. R., pp. 198-99. Although not a boundary line, the location of a meanderline can have independent historical significance based upon the instructions given to the GLO surveyor for purposes of locating the meanderline. Id. at p. 199.

The Hudson property is located in Section 3, Township 61 North, Range 4 West, Boise Meridian. Id. The Hudson property was initially surveyed for the GLO on September 7, 1900 by Robert Bonser. Id. The Manual of Surveying Instructions in effect at the time of the Bonser survey would have been the 1894 version of the Manual of Surveying. Id.

The 1894 Manual of Surveying directed the surveyor to locate the meanderline consistent with the then-existing Ordinary High Water Mark which, in Idaho, coincides with the vegetation line. Id. at pp. 199-200. Thus, the existing vegetation line, at the time of the survey, ten years after statehood, was supposed to form the basis for locating the sinuosity of the shore. Id.

Accordingly, while the physical location of the meanderline is not in and of itself a boundary, the location of a given meanderline on an inland navigable lake has independent historical significance because the GLO surveyor was instructed, on a particular date (in this case, September

7, 1900), to place the meanderline where the vegetation line actually existed. Id. at p. 200. For purposes of proceedings before the District Court, IDL introduced no lake elevation readings prior to 1930. Id. However, we do know that the GLO surveyor placed the meanderline, based upon the vegetation line as it existed on September 7, 1900, waterward of 2437.64 feet. Id.

If the OHWM of Priest Lake at statehood was two vertical feet lower than the level urged by IDL, consistent with the pre-1950 hydrograph evidence and the inferences gleaned from historical surveys, then the Hudson encroachments would be located above the OHWM. Specifically, an OHWM of 2435.64 feet (two feet lower than the level urged by IDL) would have the effect of extending the Hudson property nineteen (19) feet waterward of the boundary as it exists at lake level 2437.64 feet. Id. at p. 202. If the Hudson property is extended nineteen (19) feet waterward of elevation 2437.64 feet, the Hudson encroachment is on Hudson's property, and not the property of the State. Id.

Hudson and his wife acquired their property in 1997. R., p. 167. The same year, the Hudsons made application to IDL for the placement of a dock adjacent to their property. Id. A permit was issued on July 1, 1997, and the Hudsons subsequently constructed the dock as authorized. Id.

Shortly thereafter, it became evident to the Hudsons that increased boat traffic on Priest Lake, coupled with an increase in the typical size of those boats, together with the resulting boat wake activity, was damaging and degrading the shoreline of their property. Id. The destabilization caused

by these factors was exacerbated during periods of intermittent storms. Id. Hudson believed that the OHWM of Priest Lake was lower than the level urged by IDL. Id. Noting the continued destabilization of his property, and believing that the boundary of his property extended waterward some distance below 2437.64 feet, Hudson sought to preserve and to protect his shoreline. Id. at p. 168. On a periodic and intermittent basis, from late 1997 through approximately early 2014, Hudson would personally perform work on his property in an effort to stabilize the shoreline. Id. Hudson performed this work, by hand, and placed largely naturally-occurring materials from land contiguous to the beach on his exposed shoreline area. Id. Hudson placed these materials at or about the area he believed to be the boundary of his property, during periods when his property was exposed and free from the presence of water. Id. In other words, all of that work was personally performed by Hudson when his property was “dry” and free from any water. Id.

Hudson did not seek a permit for the work he accomplished by hand as he believed, and continues to believe, that he was working on his own property, and placing no encroachments on the property of the State. Id. Hudson’s work proceeded over several years, on an intermittent basis, when he had the time and circumstances would warrant. Id.

Hudson never received any complaint or inquiry from or on behalf of the State until July 17, 2014. R., p. 169. Upon receipt of the State’s demand, that he remove the encroachments, Hudson engaged professionals to assist in the preparation of a responsive plan. Id. IDL rejected the recommendation. The State then brought this proceeding.

II. ISSUE PRESENTED ON APPEAL.

Whether the District Court erred in granting IDL's Motion for Partial Summary Judgment on IDL's First Claim for Relief (which alleged that Hudson had violated the terms of the Lake Protection Act by placing fill waterward of the Ordinary High Water Mark of Priest Lake)?

III. STANDARD OF REVIEW.

The District Court's Partial Judgment was entered upon IDL's successful Motion for Partial Summary Judgment. The governing standard of review in this regard is as follows:

On appeal from an order granting a party's motion for summary judgment, this Court employs the same standard of review that the trial court uses in ruling on a motion. Banner Life Ins. Co. v. Mark Wallace Dixon Irrevocable Trust, 147 Idaho 117, 123, 206 P.3d 481, 487 (2009). Summary judgment is appropriate when the pleadings, affidavits, and discovery documents before the Court indicate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(c); Banner Life Ins. Co., 147 Idaho at 123, 206 P.3d at 487. The moving party carries the burden of proving the absence of a genuine issue of material fact.

Losee v. Idaho Co., 148 Idaho 219, 222, 220 P.3d 575 (2009).

IV. ARGUMENT.

A. The Statutory Framework Underlying IDL's First Claim for Relief.

IDL's first claim for relief, upon which partial summary judgment was granted, was asserted under the Lake Protection Act, I.C. §58-1301, et seq. ("LPA"). The Hudson encroachment is "an encroachment not in aid of navigation," as defined by IDAPA 20.03.17.010(10), and the District

Court so held. R., p. 344. “Encroachments not in aid of navigation” is a term that may be used interchangeably with “non-navigational encroachments.” See I.C. §58-1302(i).

Non-navigational encroachments on the beds of navigable lakes of the State may only be authorized under a permit issued in conformity with LPA. See I.C. §58-1301. The term “beds of navigable lakes,” for purposes of administering the LPA, is defined as follows:

- (B) “Beds of navigable lakes” means the lands lying under or below the “natural or ordinary high water mark” of a navigable lake and, for purposes of this Act only, the lands lying between the natural or ordinary high water mark and the artificial high water mark, if there be one.

See I.C. §58-1302(b).

For purposes of summary judgment, IDL sought removal of the Hudson encroachments placed waterward of elevation 2437.64 feet. The District Court held that it did not matter whether or not elevation 2437.64 feet was the “natural or ordinary high water mark” (OHWM) or the “artificial high water mark” (AHWM) of Priest Lake, since IDL had jurisdictional authority to regulate encroachments below either mark. R., pp. 345-46. Based on this finding, the District Court ordered the removal of all Hudson encroachments lying below elevation 2437.64 feet (which by necessity included the Hudson encroachments lying between 2435.64 and 2437.64 feet). The District Court’s finding and the resulting partial summary judgment are in error because they were improperly entered given the presence of genuine issues of material fact.

B. IDL Specifically Denied, Under Oath and Through Counsel, that Priest Lake had an Artificial High Water Mark.

The District Court determined that the Hudson encroachment, lying below 2437.64 feet, should be removed regardless of whether or not elevation 2437.64 feet was the OHWM or AHW of Priest Lake. The District Court's finding was improperly entered in the context of a motion for partial summary judgment. IDL's own representations to the District Court wholly undermine the propriety of the partial summary judgment.

In its "Verified Complaint," IDL averred, under oath and as a statement of fact, that Hudson had placed an encroachment "below the ordinary high water mark adjacent to Hudson's property...." R., p. 6. Hudson answered IDL's Verified Complaint, specifically denying IDL's allegation that he had placed an encroachment below the OHWM of Priest Lake. Id. at p. 19. Hudson counterclaimed, by way of claims for declaratory relief and quiet title, alleging that his encroachments were upland of the OHWM of Priest Lake. R., p. 22 (§10). In reply to Hudson's counterclaims, IDL denied Hudson's allegation and affirmatively alleged that the OHWM of Priest Lake was 2437.64 feet. Id. at p. 28.

In its Motion for Partial Summary Judgment, IDL, through counsel, specifically represented to the Court that IDL "denies that there is an artificial high water mark of Priest Lake...." R., p. 70. This representation was restated in the Memorandum IDL filed in support of its Motion for Partial Summary Judgment: "As set forth in the State's pleadings, the State specifically denies that there is an artificial high water mark of Priest Lake." Id. at p. 73. For purposes of summary judgment,

this Court should take note that IDL's complaint was verified. By stating that there is no AHW on Priest Lake, IDL was stating the same as a sworn representation of fact. Further, the representations and positions taken by a party's counsel bind the client. Moreover, IDL asserted other sworn testimony that there was no AHW on Priest Lake. In support of its Motion for Partial Summary Judgment, IDL filed the Affidavit of Mick Schanilec, Area Manager for the Priest Lake Supervisory Area for IDL. Schanilec stated, under oath, that "the State considers the natural or ordinary high water mark" of Priest Lake to be elevation 2437.64 feet. R., p. 84.

Based on the foregoing, in the context of a Motion for Partial Summary Judgment, it was established, by IDL's own evidence, that there was no AHW on Priest Lake. IDL sought relief, in the form of an injunction ordering the removal of the subject encroachment, based solely upon the claim that the Hudson encroachment was located below the OHWM and not below an AHW (since IDL affirmatively cited that an AHW even existed). In order to prevail at summary judgment, IDL was required to show that there were no genuine issues of material fact that the OHWM of Priest Lake at statehood was located at 2437.64 feet.

C. Location of a Given OHWM Presents an Issue of Fact.

The precise location of an OHWM is a question of fact. See, e.g., U.S. v. Marion L. Kincaid Trust, 463 F. Supp.2d 680 (Ed. Mich. 2006). In both In Re: Sanders Beach, at 143 Idaho 443, and Erickson v. State, 132 Idaho 208, this Court set forth detailed discussions of evidence to be considered in the context of determining the location of a given OHWM on an inland navigable lake

in the State of Idaho. While not directly stating that the location of an OHWM in Idaho is a question of fact, such conclusion can reasonably be drawn from this Court's analyses in the two cited cases.

D. The Materials Properly Before the District Court on Summary Judgment.

IDL supported its motion with its Verified Complaint (R., pp. 7-14), coupled with the Affidavits of Mick Schanilec (R., pp. 82-111) and Matthew Anders (R., pp. 112-47). The foregoing submissions were filed in a timely manner compliant with the requirements of IRCP 56(b)(2). Hudson filed three declarations in opposition to IDL's motion: the Declaration of Philip Hudson (R., pp. 166-94); the Declaration of Ernest M. Warner, PLS (R., pp. 195-215); and the Declaration of Drew C. Dittman, P.E. (R., pp. 216-22).

On June 15, 2016, seven days before the hearing it had noticed on its Motion for Partial Summary Judgment, IDL filed a Second Affidavit of Mick Schanilec. R., pp. 231-50. Rule 56(b)(2) requires that affidavits in support of a motion for summary judgment be filed at least twenty-eight (28) days before the date of the hearing. Rule 56(b)(2) only authorizes the moving party to file a "reply brief," to the exclusion of further affidavits, seven (7) days before the date of the hearing. IDL did not accompany the second Schanilec affidavit with a motion to alter the timelines under Rule 56(b)(3).

On June 17, 2016, Hudson moved to strike the second Schanilec affidavit. R., pp. 251-52. The District Court did not rule upon Hudson's motion to strike the second Schanilec affidavit. R., p. 346.

For purposes of appellate review, this Court is to “employ the same standard of review that the trial court used in ruling on the motion.” Banner Life Ins. Co. v. Mark Wallace Dixon Irrevocable Trust, 147 Idaho at 123. Accordingly, this Court should, by necessity, address Hudson’s motion to strike the second Schanilec affidavit.

As noted, Rule 56(c) does not contemplate the filing of “reply affidavits” or any other affidavit not filed and served twenty-eight (28) days before the time fixed for the hearing. The language contained in Rule 56(c) is mandatory. See, e.g., Sun Valley v. Rosholt, Robertson & Tucker, 133 Idaho 1, 5, 981 P.2d 236 (1999).

Federal courts have reached the same conclusion under federal procedures applicable to motions for summary judgment. For example, in Tishcon Corp. v. Soundview Communications, Inc., 2005 W.L. 6038743 (N.D. Ga. 2005), the Plaintiff moved for partial summary judgment and submitted supporting declarations. After the Defendant had responded, the Plaintiff submitted additional declarations with its reply memorandum. The Defendant then moved to strike the Plaintiff’s reply declarations, arguing that they were untimely because they did not accompany the motion when filed. The Defendant contended that because the reply declarations were submitted after the Defendant had responded to the Plaintiff’s motion, that the Defendant would be unfairly prejudiced by the Court’s consideration of those declarations.

The Court agreed with the Defendant, noting that the rule was intended “to ensure that the party opposing a motion for summary judgment be given sufficient time to respond to the affidavits

filed by the moving party, thereby avoiding any undue prejudice.” Tishcon Corp., 2005 W.L. 6038743 at p. 8.

Justice is not served by allowing a moving party to unfairly surprise and prejudice the non-movant by producing evidence of new, substantive facts at the last minute when there is no opportunity [under the rules] for the non-movant to respond....

Id.

In the case at bar, IDL failed to offer any justification for the untimeliness of the second Schanilec affidavit. Moreover, IDL failed to file a motion under Rule 56(b)(3) to alter the mandatory timelines that apply to motions for partial summary judgment. For the foregoing reasons, the second Schanilec affidavit should not be considered for purposes of resolving this appeal.

E. Material Issues of Fact Precluded an Entry of Partial Summary Judgment.

IDL specifically denied, under oath, that Priest Lake had an AHW. IDL further stated, under oath and through representations of counsel, that the OHWM of Priest Lake was located at elevation 2437.64 feet. Based upon these sworn statements, IDL moved for entry of a partial summary judgment finding that Hudson had violated the LPA by placing an unpermitted encroachment waterward of Priest Lake’s OHWM.

The location of the OHWM itself, as of July 3, 1890, presents an issue of fact. See, e.g., In Re: Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006). See also Erickson v. State, 132 Idaho 208, 970 P.2d 1 (1998). Through his opposing submissions, Hudson raised material issues of fact as to the location of the OHWM of Priest Lake and as to whether or not the Hudson encroachment was

located upland of said OHWM.

Prior to 1950, and based upon all available historic hydrographs presented to the Court on summary judgment, the level of Priest Lake naturally receded during the summer growing season to an elevation at least two vertical feet below 2437.64 feet. R., pp. 198 and 205. Resolving all inferences in favor of Hudson, as the non-moving party, and recognizing that vegetation grows in Idaho in the month of August, one can reasonably conclude, for purposes of summary judgment, that vegetation grew along the shores of Priest Lake, to an elevation of 2435.64 feet, at Statehood. This inference is consistent with the expert opinion offered by Warner as to the location of historic meanderlines.

While meanderlines are not in and of themselves boundary lines, the location of the same can have independent historical significance based upon the instructions given to the GLO surveyor for purposes of locating the line. R., pp. 198-99. Hudson's property was initially surveyed by the GLO on September 7, 1900, approximately ten years after statehood. The contract under which Robert Bonser surveyed the Hudson property for the GLO instructed Bonser to locate the meanderline in a manner consistent with the then-existing Ordinary Mean High Water Mark which, in Idaho, coincides with the vegetation line. R., pp. 199-200. Accordingly, while the physical location of the meanderline is not in and of itself a boundary, the location of a given meanderline on an inland navigable lake has independent historical significance because the GLO surveyor was instructed, on a particular date (in this case, September 7, 1900), to place the meanderline where the vegetation line

existed. Id.

For purposes of this proceeding, although there may be no reliable lake elevation readings prior to 1930, we do know where the GLO surveyor placed the meanderline, based upon the presence of then-existing vegetation, on September, 1900. Id. The location of the meanderline associated with the Hudson property suggests that the vegetation line, as of September 7, 1900, was located approximately nineteen (19) feet waterward of elevation 2437.64 feet. Id. at pp. 201-02.

Physical measurements of the Hudson encroachment show that most, if not all of the encroachments, are located within this nineteen (19) feet expanse between elevations 2435.64 and 2437.64. R., pp. 202 and 217.

Summary judgment is appropriate only when there is no genuine issue of a material fact based upon the admissible record evidence. Moss v. Mid-America Fire & Marine Ins. Co., 103 Idaho 298, 647 P.2d 754 (1982). In determining whether or not a genuine issue of material fact exists, the Court is to construe the record evidence in a light most favorable to the party opposing the motion. Farmer's Ins. Co. v. Brown, 97 Idaho 380, 544 P.2d 1150 (1976). Hudson raised material issues of fact as to both the location of the OHWM of Priest Lake at Statehood and whether or not his encroachment was located upland of said OHWM (i.e., on his own property).

F. The District Court Erred, as a Matter of Fact and of Law, by Determining that Priest Lake had an AHW of 2437.64 Feet.

The District Court improperly granted IDL's Motion for Partial Summary Judgment, reasoning that it did not need to determine the location of the OHWM of Priest Lake since IDL had

jurisdiction to regulate encroachments up to and including the AHW. R., p. 346. The District Court's decision was in error, both as a matter of fact and as a matter of law.

From a factual perspective, IDL, as the moving party, averred under oath that the OHWM of Priest Lake was located at 2437.64 feet. R., p. 84 (§5). IDL specifically denied, as a matter of fact, that there was an AHW on Priest Lake. R., p. 73 ("As set forth in the State's pleadings, the State specifically denies that there is an Artificial High Water Mark of Priest Lake."). IDL's relief was sought based upon a claim that Hudson's encroachment was "constructed at and below the Ordinary High Water Mark of Priest Lake." R., p. 11.

The District Court plainly erred by entering a decision that determined that Priest Lake had an AHW and that the AHW was located at elevation 2437.64 feet. Essentially, the District Court held that it made no difference as to whether or not the Hudson encroachment was located waterward of the OHWM or the AHW since IDL had jurisdiction up to and including both elevations. However, based upon its pleadings, and the sworn submissions submitted in support of the motion, IDL specifically denied that Priest Lake had an AHW and affirmatively sought to prove that the OHWM of Priest Lake was at elevation 2437.64 feet. Hence, the District Court improperly resolved an issue of fact which was, by necessity, rendered incapable of resolution based upon the positions and facts advanced by IDL.

Regarding the matter of law, the District Court erred by holding that IDL had jurisdiction under the LPA over the Hudson encroachments based upon an AHW which the State said did not

exist. Section 58-1302(b) acknowledges IDL jurisdiction over “the lands lying between the natural or ordinary high water mark and the artificial high water mark, if there be one.” However, since IDL denies that there is an artificial high water mark on Priest Lake, and affirmatively alleges (under oath) that the OHWM is 2437.64, IDL was required to prove the absence of any material issue of fact as to the location of said OHWM. Given the procedural posture of this case, and given the facts sworn to by IDL, any analysis or conclusion based upon a hypothetical AHW was inappropriate.

At the end of the day, IDL claimed as follows. That Priest Lake had no AHW; that the OHWM of Priest Lake was located at elevation 2437.64 feet; and that the Hudson encroachment was located waterward of 2437.64 feet. Hudson opposed the motion by raising genuine issues of material fact as to the location of the OHWM of Priest Lake as represented by IDL. In making its decision, the District Court, by its own admission, ignored Hudson’s evidence as to the location of the OHWM (including the Declaration of Ernest M. Warner, PLS). R., p. 346. In so doing, the District Court committed reversible error.

In essence, the District Court granted relief to IDL even though IDL failed to prove the existence of a material element necessary to its claim. How can IDL be granted relief based upon the location of an AHW when IDL specifically denies that there even is an AHW? By way of analogy, this is no different than a litigant bringing a cause of action for adverse possession and being granted summary judgment even though the litigant denies he openly and notoriously used the property in issue (a material element of an adverse possession claim). By way of further analogy,

it is no different than a litigant bringing a claim for breach of contract and being granted summary judgment even though the litigant denies that there was a contract (a material element of the claim).

G. IDL is Estopped, Both at the District Court and Appellate Levels, From Claiming That There is an AHW on Priest Lake.

Having denied under oath that there is an AHW on Priest Lake, IDL is now estopped to claim otherwise, whether before the District Court or this Court. Moreover, IDL cannot obtain relief by contradicting its own sworn testimony.

In Radobenko v. Automated Equipment Corp., 520 F.2d 540 (9th Circuit 1975), the Court, under Federal Rule of Civil Procedure 56(c), held that a party could not contradict its sworn statements for purposes of obtaining relief on summary judgment. This Court has similarly held as much in other contexts. See, e.g., Arregui v. Gallegos-Main, 153 Idaho 801, 291 P.3d 1000 (2012); Frasier v. J.R.Simplot Co., 136 Idaho 100, 29 P.3d 936 (2001).

V. CONCLUSION.

Based upon the reasons and authorities set forth herein, Appellant Philip Hudson respectfully requests that this Court reverse the District Court's Memorandum Decision and Order on partial summary judgment, vacate the District Court's Judgment and Amended Judgment, dissolve the


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District Court's mandatory and permanent injunction, remand the matter for further proceedings with this Court's opinion, and award Hudson his costs on appeal.

Dated this 27th day of January, 2017.



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